



The Terminator v. The Video Gaming Industry: Schwarzenegger v. Entertainment Merchants Association

11.12.2010

It is somewhat ironic that Arnold Schwarzenegger, the icon of 1980s science fiction violence, is the plaintiff in an action seeking to restrict the sale of violent video games in California, a dispute that was argued last week in the U.S. Supreme Court (Scotusblog has all of the cert. and merits briefs collected here, in addition to coverage of the case). California's statute was stricken by a unanimous panel of the United States Court of Appeals for the Ninth Circuit as an unconstitutional violation of First Amendment rights. The Supreme Court granted cert. and debated sex, violence and free speech to determine whether the California law could be upheld in response to the facial challenge presented.

At oral argument (audio of the argument can be found here), the majority of justices attacked the vagueness of the law and questioned how it could be fairly applied. In response to pointed questioning, California's Deputy State Attorney General struggled to explain which video games would be prohibited, why the law would be applied equally to 8 year olds and 17 year olds, and generally how to define violence. Justice Scalia expressed the difficulty video game producers would have in understanding and complying with the law. For example, the state's law restricts games where a player can participate virtually in "killing, maiming, dismembering, or sexually assaulting the image of a human being." In response to a question from Justice Sotomayor, California's counsel admitted that the law would not apply to such violence if perpetrated on a Vulcan (from Star Trek). Six of the nine justices appeared to agree that the law is an unconstitutional abridgement of the First Amendment.

The gaming industry's attorney fared better in the argument, but was not immune from attack. Chief Justice Roberts along with Justices Breyer and Alito explored more feasible way for states to keep younger children away from truly violent video games, even while seemingly convinced that California has not found the right answer. The Justices did appear to feel that there is a social problem with children committing violence from their computers. The Chief Justice elicited a concession from EMA's attorney, from which he tried to backtrack, that perhaps a law narrower than California's could survive constitutional scrutiny.

While a majority of justices appear ready to affirm the Ninth Circuit and strike the California Statute, the Supreme Court's decision to hear the case in the absence of disagreements in the lower courts and the oral argument itself suggests that the justices might be prepared to rethink how the First Amendment applies to certain depictions of violence, at least when they are sold to children. The case and its aftermath could have major implications for gaming and entertainment companies, and for states seeking to enforce such restrictions.

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